

**STATE OF TENNESSEE**

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Opinion No. 04-046

Applicability of Statute of Anne Provisions Regarding Gambling

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**QUESTION**

Whether any of the provisions of the Statute of Anne, part of English common law, regarding gambling-related contracts and property transfers have been adopted in Tennessee?

**OPINION**

Yes. Legal principles similar to those set forth in the Statute of Anne regarding gambling-related contracts and property transfers have been adopted into Tennessee law, in particular Tenn. Code Ann. §§ 29-19-101 — 106.

**ANALYSIS**

Early English common law did not prohibit gambling, although over the years English statutory law has attempted to regulate various types of gambling and wagering.<sup>1</sup> At common law, a losing party could not recover back money paid on a gaming contract. *See Nichol v. Batton*, 11 Tenn. 469 (Tenn. Err. & App. 1832).

Purportedly, “[i]n the seventeenth and eighteenth centur[ies], gambling among the British gentry was rampant.” *Introduction to Casino Gambling*, 64 Miss. L.J. at 296. Problems were created for England’s land-based aristocracy because of large transfers of wealth or property related to gambling. This problem apparently led the English in 1710 to adopt “[a]n Act for the better preventing of excessive and deceitful gaming,” 9 Anne, ch. 14 (1710), which is known as the Statute of Anne (named for Britain's then reigning Queen).

The Statute of Anne, in part, provided: “[A]ll Notes, Bills, Bonds, Judgments, Mortgages, or other Securities or Conveyances whatsoever, given, granted, drawn, or entered into, or executed by any person . . . where the whole or any Part of the Consideration of such Conveyances or

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<sup>1</sup> It is reported that *The Case of Monopolies*, 77 Eng. Rep. 1260, 1264 (1602), “held that all games were legal unless expressly made illegal by Parliament,” which “severely limited” the “Government’s ability to regulate gambling . . . [as] a slight modification to a prohibited game would make the game legal until Parliament was able to respond.” Ronald J. Rychlak, *The Introduction of Casino Gambling: Public Policy and the Law*, 64 Miss. L.J. 291, 296 n.32 (1995)(“*Introduction to Casino Gambling*”).

Securities, shall be for any money, or other valuable Thing whatsoever, won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the Sides or Hands . . . shall be utterly void, frustrate, and of none Effect, to all intents and purposes whatsoever . . . ." 9 Anne, ch.14, § 1 (1710)(Eng.). Furthermore, the recovery of certain gambling losses through lawsuits was allowed.

Section 2 [of the Statute of Anne] provided that any person "who shall, at any time or sitting, by playing at Cards, Dice, Tables or other Game or Games whatsoever, or by betting on the Sides or Hands of such as do play," lose "in the whole, the Sum or Value of ten Pounds, and shall pay or deliver the same," shall be "at Liberty, within three months then next, to sue for and recover the Money or Goods so lost \* \* \* from the respective Winner or Winners thereof, with Costs of Suit, by Action of Debt Founded on this Act." If the loser did not sue, any other person could sue for treble damages, one moiety for the suitor, and one moiety for the poor of the parish. Section 3 provided for discovery, section 4, that repayment should acquit of further punishment; section 5, that winning by fraud above ten pounds should be punished as perjury, with recovery of five times the amount won; and section 8 provided penalties and imprisonment for assault on account of money won at play.

*LaFontaine v. Wilson*, 45 A.2d 729, 731-32 (Md. App. 1946)(quoting and discussing provisions of the Statute of Anne)(court reported that the Statute of Anne was "modified by 55 and 56 Vict. ch. 9 (1892) so as to prevent recovery by a loser after payment"). While the Statute of Anne did not affect gambling debts of less than ten pounds, it had the desired effect of making large gambling debts unenforceable and curtailed the large transfers of wealth and property that had lead to its enactment. *Introduction to Casino Gambling*, 64 Miss. L.J. at 296, n. 35, citing I. NELSON ROSE, *GAMBLING AND THE LAW* 73 (1986).

Tennessee is a common law state, and Article X, Section 2, of the Tennessee Constitution of 1796 (Article XI, Section 1, of the current (1870) Constitution) effectively "adopted the common law of England 'as it stood at (1776) and before the separation of the colonies . . . it being derived from North Carolina out of which state the State of Tennessee was carved.'" *State v. Alley*, 594 S.W.2d 381, 382 (Tenn. 1980), quoting *Dunn v. Palermo*, 522 S.W.2d 679, 682 (Tenn. 1975). Therefore, the Statute of Anne, as part of that existing common law of England, was adopted as law in this state (similar to what occurred in most states). "That [common] law prevails unless and until changed by statute." *Alley*, 594 S.W.2d at 382, citing *Monk v. Ramsey*, 223 Tenn. 247, 443 S.W.2d 653 (1969).

Tennessee's act of 1799, ch.8, §§ 1, 4, & 5, is almost a literal copy of portions of the Statute

of Anne, 9 Anne, ch. 14, especially its §§ 1 & 2.<sup>2</sup> The only material difference is that the act of 1799 allows that suits by a gambling loser may be made within ninety days to recover any amount lost, with no requirement such as in the Statute of Anne that the loss must be at least ten pounds at one sitting. *Nichol v. Batton*, 11 Tenn. 469 (Tenn. Err. & App. 1832)(Section 4 of Tennessee’s act of 1799, ch. 8, set a statute of limitations of ninety days for a gambling loser to sue to recover such losses, including payment of gambling losses collected through a note). As the act of 1799 allowed one to file suit within ninety days to recover property lost at gambling, if the losing party peaceably regains possession of the wagered property within those ninety days, he may lawfully retain it to the exclusion of the wagering winner. *William Hutchison and Nancy Peters v. Edwards*, 8 Tenn. 262 (Tenn. Err. & App. 1827). Aside from the 1799 statute, at common law, if a person unfairly loses at gambling, but voluntarily pays the losses with knowledge of the circumstances, there is no remedy in court to recover those losses. *Whiteside v. Executors of Tab.*, 3 Tenn. 383 (Tenn. Err. & App. 1813). Pursuant to the act of 1799, a person may only sue to recover his own losses and not the property lost by someone who joined him in making the bet and voluntarily paid his portion of the loss. *Wood v. Owens*, 32 Tenn. 146 (Tenn. 1852). The right to recover money paid on a gambling loss, set forth in the act’s §4, applies only to monies paid without a lawsuit being filed, but it does not apply to money paid to a winner on a valid court judgment. *Holland v. Pintle*, 29 Tenn. 167

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<sup>2</sup> Tennessee’s act of 1799, ch. 8, “an Act to suppress excessive gaming,” in part, provided:

§ 1. [Every promise, agreement, note, bill, bond or other contract, to pay, deliver or secure money or other thing won or obtained by playing at cards, dice, billiards, horse-racing, or any other species of gaming whatsoever, or by wagering or betting on either of the parties, who shall play at such games, or run such races or to repay or secure money or other thing lent or advanced for that purpose, or lent or advanced at the time of such gaming, playing, betting, laying or adventuring, shall be void and every conveyance or lease of land, tenement and hereditaments, sold, demised or mortgaged, and every sale, mortgage or other transfer of slaves, or other personal estate, to any person, or for his use to satisfy or secure money so won, lent, or advanced, on due proof thereof, made before any jurisdiction having cognizance thereof, shall be and the same is hereby declared void.

§ 4. . . . [ T]hat if any person or persons shall lose any money or other valuable thing, at or upon any game of address or of hazard, or on horse racing, or on any other play or game whatever, and shall pay or deliver the same or any part thereof, the person or persons so losing and paying or delivering the same, shall have a right within ninety days then next or thereafter to sue for and recover the money or goods so lost and paid or delivered or any part thereof, from the respective winner or winners thereof, with costs of suit, by action of debt or case, for the value of the money or thing so lost, founded on this act, to be prosecuted in any court of record having cognizance thereof, or before any justice of the peace, if the sum so won is under twenty dollars, subject nevertheless to an appeal as in all other cases; and in which action it shall be sufficient for the plaintiff or plaintiffs to allege that the defendant or defendants is or are indebted to him, her or them, or hath or have received to his, her or their use, the money so lost and paid, or converted the goods won of him, her or them, to the use of the defendant or defendants, whereby the action of the plaintiff or plaintiffs accrued to him, her or them, according to the form of this act.

§ 5. . . . [T]hat any person instituting a suit before any justice of the peace, or in any court of record within this state, for the recovery of money won, lent or advanced at any species, of gaming whatsoever, on due proof being made thereof, shall forfeit and pay the sum of one hundred dollars, recoverable in any court having cognizance thereof, one half to him who will sue for the same, the other half to the county wherein such cause shall originate.

(Tenn. 1849). Furthermore, the time limitations of the act of 1799 do not apply to the common law right of a person to sue a stake-holder of money deposited in regard to betting on an illegal horse race, when the plaintiff requested a return of the money entrusted with the stake-holder prior to its payment to the alleged gambling winner. *Perkins v. Hyde*, 14 Tenn. 288 (Tenn. Err. & App. 1834).

The ninety-day time limitation for filing suit to recover property lost in gambling, contained in the act of 1799, ch. 8, § 4, did not apply to equitable actions to set aside conveyances of real property made upon a gaming consideration. *Johnson v. Cooper and Crosswhite*, 10 Tenn. 524 (Tenn. Err. & App. 1831). The provisions of the act of 1799, ch. 8, making gambling contracts illegal and void, allowed a judgment creditor of one who conveyed real property as payment for a wager to set aside the conveyance and execute upon that real property as it still belonged to the loser. *Williams v. Talliaferro and Sharp*, 41 Tenn. 37 (Tenn. 1860).

Wagering on the outcome of elections was not expressly covered by the 1799 statutes dealing with gaming, so the courts by applying the common law would not help a person recover money or property voluntarily paid to cover such a loss. *Allen v. Dodd*, 23 Tenn. 131 (Tenn. 1843). However, money lent for the express purpose of betting on an election is not a legal transaction; therefore, the courts would not assist a person in recovering the loaned funds from the loser, who had already paid those loaned funds to the winner. *Bates v. Watson*, 33 Tenn. 376 (Tenn. 1853). To render a contract for the loan of money void under the act of 1799, ch. 8, §1, the loan must be to someone engaged in the game, such as by playing or betting, or otherwise promoting the gambling. *Smith v. Harris*, 35 Tenn. 553 (Tenn. 1856).

Except as specifically provided therein, the Code of 1858 repealed all public and general statutes of this state, including the English statutes, then existing and in force in this state. *State v. Miller*, 79 Tenn. (11 Lea) 620 (1883). However, “the decisions of the Courts of Tennessee announced prior to the enactment of the Code of 1858, construing and applying ancient English statutes, and establishing principles and rules of law and rules of property thereon, were not annulled by said code [and] such decisions had become a part of our own jurisprudence . . . as part of what may well be termed our own common law.” *Shepherd Fleets, Inc. d/b/a Dollar Rent A Car v. Opryland USA, Inc., d/b/a Opryland Hotel*, 759 S.W.2d 914, 916 (Tenn. App. 1988), *perm. app. denied*.

The Tennessee Code of 1858, at §§ 1769 — 1775 was in part derived from the provisions of the act of 1799, ch.8, in particular the provisions that gambling contracts are void and that gambling winners may not sue (§1), and losers are allowed ninety days to bring suits to recover property (§4). Those legal principles similar to the Statute of Anne’s provisions were included in the 1932 Tennessee Code (§§ 7812 — 7816) and appear in the current Tennessee Code.

Similar to the Statute of Anne, Tenn. Code Ann. § 29-19-101, currently provides:

All contracts founded, in whole or in part, on a gambling or wagering

consideration, shall be void to the extent of such consideration.<sup>3</sup>

Accordingly, like the Statute of Anne, Tenn. Code Ann. § 29-19-102 prohibits gambling winners from suing to recover any winnings, as “[n]o money, or property of any kind, won by any species or mode of gambling, shall be recovered by action.”

Tenn. Code Ann. § 29-19-103, similar to a portion of the Statute of Anne, 9 Anne, ch. 14, § 2, authorizes *qui tam* for bringing legal action involving gambling contracts.

Any person who institutes an action for money or property, claimed under a contract founded on a gambling consideration, shall forfeit one hundred dollars (\$100), recoverable in any court having cognizance; one-half (1/2) to the person who shall sue therefor, the other one-half (1/2) to the county in which action is brought.

In an expansion of the rights under the Statute of Anne, Tennessee law provides that not only persons who lost money, but also their families, may timely bring actions to recover such losses paid to gambling winners. Tenn. Code Ann. § 29-19-104 provides:

Any person who has paid any money, or delivered anything of value, lost upon any game or wager, may recover such money, thing, or its value, by action commenced within ninety (90) days from the time of such payment or delivery.

Tenn. Code Ann. § 29-19-105 provides:

Any other person may, after the expiration of the ninety (90) days, and within twelve (12) months thereafter, recover the amount of such money, thing, or

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<sup>3</sup> This provision prevents an innocent holder of a note founded on settlement of a gambling debt from recovering against the maker, as the note is void in any hands. *Snoddy v. American National Bank*, 88 Tenn. 573, 13 S.W. 127 (1890). However, a previously issued valid cashier’s negotiable certificate, which was subsequently endorsed and delivered in payment of a gambling debt, may be collected by an innocent holder in due course who had no notice of its involvement in the gambling. *Wincoff Operating Co. v. Pioneer Bank*, 179 Tenn. 306, 165 S.W.2d 585 (1942). Under Tennessee’s statutes, when a loser at poker repossessed himself of money lost at gambling, under the pretense of borrowing it back from the winner and giving the winner a note for that amount, such a note is void and not collectible. *Stanford v. Howard*, 103 Tenn. 24, 52 S.W. 140 (1899).

Applying a similar prohibition in Alabama law, the holder of a winning Florida lottery ticket was found not to have to share the winnings with others due to an alleged prior oral agreement they all had made to share the winnings if any one of them was a winner. Such an agreement was void and unenforceable as a “contract founded . . . on a gambling consideration. *Dickerson v. Deno*, 770 So.2d 63 (Ala. 2000), *rehearing denied* (2 Justices dissenting). By contrast, other jurisdictions’ courts have found that winnings must be shared when the parties are joint-purchasers and owners of lawful lottery tickets - as these are not unlawful gambling contracts. *See, e.g., Talley v. Mathis*, 265 Ga. 179, 453 S.E. 2d 704 (1995); *Pearsall v. Alexander*, 572 A.2d 113 (D.C. 1990).

its value, by action for the use of the spouse; or, if no spouse, the child or children; and, if no child or children, the next of kin of the loser.

In a further expansion of the rights under the Statute of Anne, Tennessee law allows creditors of the losing party to bring suit to recover gambling losses paid, but only after the expiration of the time for the loser or their families to sue for recovery. Tenn. Code Ann. § 29-19-106 provides:

After the expiration of the time prescribed in § 29-19-105, and within twelve (12) months thereafter, any creditor of such losing party may, by garnishment or action, recover the amount of such money, thing, or its value, in satisfaction of so much of the creditor's debt.

Clearly, some of the legal principles contained within the 1710 Statute of Anne designed to curtail excessive gambling losses have been included, and even expanded, within Tennessee law.

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